Service Union without a prior secret ballot of the members of the union.

(2) that the levy imposed by Army Civil Service Union News Bulletin Vol. 5 dated October 1962 was wrongful, *ultra vires* and void.

(3) that the striking off of the plaintiffs from the register of membership of the Army Civil Service Union for non-payment of the levy was *ultra vires* and void.

Order in terms.

Solicitors: *L. A. J. Smith*; *David Marshall.*

TANG SUI ING v. GOH TIEW LIONG

[O.C.J. (McGilligan J.) May 20, 1964]

[Sibu — Matrimonial Cause No. M/13 of 1964]

Husband and wife — Divorce — Foochow Custom in Sibu — Failure to maintain — Custody of children.

In this case the petitioner asks for dissolution of her marriage on the grounds of desertion, cruelty, failure to maintain and on the general ground that the circumstances which have arisen made it just and reasonable that the marriage should be dissolved. The evidence of the headman was that a marriage contracted under Foochow Chinese custom may be dissolved if —

(1) there is a complete and absolute desertion by one party or the other for at least two years; or

(2) there is absolute failure on the part of the husband to maintain the wife or children for at least two years; or

(3) the parties are completely out of sympathy with each other, are incompatible, find it impossible, despite genuine efforts, to live reasonably together as man and wife.

Held: on the facts, that the husband had failed to maintain his wife and his children for more than two years and therefore the wife was entitled to a decree for dissolution of the marriage and the custody of children.

PETITION FOR DIVORCE.

Madam Lee Wee Gek for the petitioner.

Respondent in person.

Cur. Adv. Vult.

McGilligan J.: The parties were married according to Foochow custom in Sibu on the 28th of August 1959, and on that date the marriage was duly registered under the Chinese Marriage Ordinance. There have been three children of the marriage: Kok Bee Yii, a girl, now aged four, Tan Sing Chiong, a boy, now aged two and a half, and Kok Bee Ee, a girl, now aged about six months.

The petitioner, the wife, asks for dissolution of the marriage on the grounds of desertion, cruelty, failure to maintain and on a general ground that the circumstances which have arisen make it just and reasonable that the marriage should be dissolved.

The court has had the benefit of the most useful and illuminating evidence of Mr. Ting Lik Hung, a Foochow Chinese Headman in Sibu for very many years, and a very well-known figure in the Foochow community and in the general community. The court fully accepts him as an expert on Foochow Chinese custom and accepts his evidence as correctly stating the rules and principles of that custom concerning divorce.

According to Mr. Ting Lik Hung a marriage contracted under Foochow Chinese custom may be dissolved if

(1) there is a complete and absolute desertion by one party or the other for at least two years, or

(2) there is an absolute failure on the part of the husband to maintain the wife or the children for at least two years, or

(3) the parties are completely out of sympathy with each other, are incompatible, irreconcilable, find it impossible, despite genuine efforts, to live reasonably together as man and wife.

Mr. Ting did not give evidence, as to whether cruelty may be a ground for divorce, and there are no decided cases in which it has been held that cruelty is a ground for dissolution of a marriage contracted under Foochow custom.

In any event the petitioner has failed to prove anything that could be called cruelty. There were, I am sure, quarrels and fights between the two of them, and I believe the respondent did sometimes slap the petitioner, and even sometimes beat her lightly; but the worst thing he did (even giving the petitioner fullest credence on this) was once to give her a push which made her fall. This was a rough and thoughtless and nasty thing to do to a woman five months pregnant, but it was only bad luck that the fall resulted in a miscarriage. Even if the push were to be regarded as cruelty it was fully condoned later by the petitioner; she went on living with the respondent, and had another child by him. The other evidence on this point falls far short of proving any kind of cruelty.

The petitioner has also failed to prove desertion for anything like two years, because by her own account she and the respondent went on living together until the 3rd of August 1963.

However, the petitioner has in my judgment succeeded in establishing failure to maintain her (and the children alive during the period) for more than two years. I found her father a most believable witness; he gave his evidence very frankly, and exhibited just that degree of indignation one would have expected in the circumstances. There was also the very strong evidence of Mr. Ting Lik Hung that the petitioner made to him, as Headman, at least 10 complaints, over the two years, of the respondent's neglecting to

maintain her. I do not believe she made all these complaints quite untruthfully with the intention of establishing a case against the respondent.

The respondent himself was not at all convincing, particularly under cross-examination. He took the line (which, I confess, never commends itself to me) of saying "How can it be proved that I did not give her money". His was not the attitude of a man stoutly asserting the truth, but of a man denying that the other party could prove the truth of her story.

His attempted explanation of his failure to buy kitchen utensils or food for the petitioner, or the children she brought with her, when she went back to live with him at 20 Central Road, Sibu, from the 7th to the 11th of January was absurd and quite unacceptable.

It is also quite clear that when Mr. Sia Ah Chau went with the petitioner on the 11th of January to 20 Central Road, Sibu (after the petitioner had returned from there to her parents' house) that the respondent refused point blank to have the petitioner back. It is plain he did not want her to live with him.

My impression is that, to use a colloquialism, the respondent thought he was "on to a good thing" when the petitioner's parents accepted him as her husband, and received him into their household, and that he throughout acted selfishly for his own benefit alone. His attitude is demonstrated by the fact that he was prepared to, and did, give away his son in adoption to the petitioner's parents.

For all these reasons I believe the petitioner and not the respondent. I hold that throughout the marriage it was the petitioner's parents who supported her and her children (the respondent agreed her father paid the rent of their room) and that throughout the marriage the respondent has completely failed to carry out his duty of supporting and maintaining the petitioner and the children of the marriage. It may be noted that the learned magistrate in the maintenance proceedings (which were brought to the notice of this court) took a different view, but the evidence before him was very scanty and inadequate, and most of what came out before me was not before him.

It also appears that the parties are, to quite a degree, incompatible, but I am not basing my decision on that ground. I rule that the petitioner is entitled to a divorce on the ground that the respondent has completely failed to maintain her (and their children) for a period of over two years.

The adoptive parents (that is the parents of the petitioner) are, of course, entitled to the custody of Tan Sing Chiong, and I cannot and do not make any order concerning him. As to the two girls they must go to the petitioner. This is obvious from the facts of the case; in addition they are girl children, are very young, and the petitioner, successful in her petition, has a settled home with her parents in which to bring them up.

It is accordingly ordered that

(1) the marriage between the petitioner and the respondent registered on the 28th day of August 1959 is hereby dissolved, and

(2) the petitioner have, until further order, the custody of the two daughters of the marriage, namely Kok Bee Yii and Kok Bee Ee.

Petition granted.

TING HOCK SENG v. KONG SING PING

[O.C.J. (McGilligan J.) May 20, 1964]

[Sibu — Civil Suit No. 139 of 1963]

Contract — Settlement — Payment of a smaller sum for a larger sum due — Payment by post-dated cheque — Whether this constitutes consideration.

In this case the paintiff claims repayment of the sum of $15,254.20 being the amount claimed to be due on a building contract under which the defendant, a building contractor, agreed to build houses for the plaintiff. The building contract was rescinded and it was agreed that the moneys paid (i.e. $21,895.70) be refunded. The defendant claimed that the plaintiff had agreed to accept $17,000 in full settlement of the defendant's debt to the plaintiff and that he gave the plaintiff a cash cheque for $3,000 and a post-dated cheque for $14,000. Subsequently at the request of the plaintiff the defendant produced $500 in cash, took back his cheque for $14,000 and gave a cheque for $13,500. Payment of this cheque was subsequently stopped by the defendant at the request of the plaintiff.

Held: as the plaintiff had received negotiable instruments in the form of the two cheques he had received something different from that to which he was entitled to and therefore there was consideration for his agreeing to take $17,000 in settlement of the debt due to him.

[**Editorial Note:** See also *Jagat Singh* v. *Arthur Heng* [1963] M.L.J. 399, where it was held that payment of a smaller sum cannot be good conisderation for accord and satisfaction of a claim for a larger one, yet if there is anything which can be a new consideration and a new benefit to the person entitled to the larger sum, that would support accord and satisfaction.]

Cases referred to:—

(1) *Goddard* v. *Brien* (1882) 9 Q.B.D. 37.

(2) *Royal Bank of Scotland* v. *Tottenham* [1894] 2 Q.B. 715.

CIVIL SUIT.

Plaintiff in person.

C. T. Wong for the defendant.

Cur. Adv. Vult.

McGilligan J.: The plaintiff's claim is for the repayment to him by the defendant of the